92-1652

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MR. ERWIN ERNST AND MATCHMAKER REAL ESTATE SALES CENTER, INCORPORATED,

Petitioners,

v.

LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, GLENN BREWER, KAREN HASKINS-BREWER, VICTOR CROWN, MELVIN DILLARD, QUEEN FRAZIER, SANDI GAFFEN, WILLIAM McCARTHY, AND SHARON SWAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether by relieving testers of the necessity of proving at trial injury in fact and standing, the Seventh Circuit has abrogated this Court's reasoning in the *Warth*, *Village of Bellwood*, and the *Haven's* opinions.

B. Whether contrary to the decision of this Court in *General Building Contractors Association*, the Seventh Circuit has applied the doctrine of *respondeat superior* as one of strict liability to real estate brokers for the conduct of their independent sales agents.

LIST OF PARTIES

The petitioners are Mr. Erwin Ernst and Matchmaker Real Estate Sales Center, Incorporated (hereinafter "Matchmaker"), an Illinois corporation. Mr. Ernst owned and managed until recently petitioner Matchmaker, a real estate business in the Marquette Park neighborhood of the City of Chicago. The respondents are Leadership Council For Metropolitan Open Communities, a not-for-profit Illinois corporation and its testers Glenn Brewer, Karen Haskins-Brewer, Victor Crown, Melvin Dillard, Queen Frazier, Sandi Gaffen, William McCarthy, and Sharon Swan.

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Petition For A Writ Of Certiorari

The petitioners, Erwin Ernst and Matchmaker, respectfully request that a writ of certiorari issue to review the order of the Seventh Circuit Court of Appeals issued in the above entitled proceedings.

OPINIONS BELOW

The opinion and order of the Court of Appeals are published at —F.2d—(7th Cir. 1992) and are printed in the appendix hereto.

JURISDICTION

The order of the Seventh Circuit Court of Appeals partially affirming the judgments against Erwin Ernst and Matchmaker were entered on December 10, 1992. The Court of Appeals denied petitioners' Petition For Rehearing With Suggestions For Rehearing En Banc on January 11, 1993. The jurisdiction of this Court is revoked under 28 U.S.C. Section 1254.

STATEMENT OF THE CASE

Petitioners Erwin Ernst and Matchmaker have defended against a single claim of violating the Civil Rights Act of 1866, 42 U.S.C. § 1982 and the 1968 Fair Housing Act, 42 U.S.C. §§ 3604 (a), (b), and (d). Pursuant to 28 U.S.C. § 636 (c), the parties consented to trial before a Magistrate judge. After a bench trial, the Magistrate judge found both Mr. Ernst and Matchmaker liable for damages. She also found four salespersons liable, but they have not petitioned here. Based on the doctrine of *respondeat superior* and Mr. Ernst's conduct after the filing of the complaint, she awarded plaintiffs compensatory damages, punitive damages, and attorneys fees.

The Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. The Seventh Circuit reversed all punitive damage awards against Mr. Ernst and Matchmaker. It also reduced the amount of compensatory damages awarded to plaintiff Leadership Council. The Court, however, affirmed the remainder of the compensatory damages awarded against petitioners based on the doctrine of *respondeat superior*. None of Mr. Ernst's conduct, nor any actions of Matchmaker violated Section 1982 or Section 3604. Both petitioners were held liable for damages because of the conduct of Matchmaker's four salespersons.

A. Factual Background

Petitioners Ernst and Matchmaker with four real estate salespersons Daniel King (hereinafter "King"), Sara Munoz ("hereinafter "Munoz"), Carol Scarpiniti (hereinafter "Scarpiniti") and Alan Walker (hereinafter "Walker") were engaged in selling residential real estate in the Gage Park and Chicago Lawn neighborhoods on the southwest side of the City of Chicago. During 1987 and 1988, operations of Matchmaker and the practices of its salespersons were tested by Leadership Council for Metropolitan Open Communities (hereinafter "Leadership Council") and its testers Glenn Brewer (hereinafter "Brewer"), Karen Haskins-Brewer (hereinafter "Haskins-Brewer"), Victor Crown (hereinafter "Crown"), Sandi Gaffen (hereinafter "Gaffen"), William McCarthy (hereinafter "McCarthy"), and Sharon Swan (hereinafter "Swan") for racial steering. Leadership Council is a not-for-profit corporation whose purpose is to promote open housing in the Chicago metropolitan area. The individual testers were employed by Leadership Council to pose as potential home buyers and then to submit a written report of their observations.

The events underlying plaintiffs one count complaint arose from five "tests" conducted by Leadership Council on the Matchmaker offices between July 22, 1987 and June 23, 1988. For each test, Leadership Council had a white couple contact the Matchmaker offices by telephone or by visit. The visit of the white couple was followed shortly by a visit by a

black couple. Both sets of couples sought residential real estate.

A unique factual aspect of this steering case is the changing demography of Gage Park and Chicago Lawn, Matchmaker's market area. The key fact evidenced by Chicago municipal statistics is that Gage Park and Chicago Lawn are not undergoing resegregation. This fact is uncontroverted. As the Magistrate found, 'Racial steering tends to cause a community to "resegregate"...' (Op. 11/7/90, p. 26) The Magistrate, however, could find no evidence and indeed made no finding that the Gage Park and Chicago Lawn neighborhoods were undergoing resegregation. (Op. 4/5/91, p. 8) Indeed and most significantly, the Magistrate did not even refer to a threat of resegregation for these neighborhoods at any point in her two lengthy opinions. She could not find a threat of resegregation because in fact whites are moving into Gage Park at a rate eleven times greater that of blacks and into Chicago Lawn at a rate almost twice that of blacks. Not only is there no white flight, there is in fact the opposite occurring. Whites are buying into Gage Park and Chicago Lawn in great numbers.

Matchmaker's own uncontested sales summaries reflect the same trend. In 1987, of a total of 110 Matchmaker sales, 50 were made in the Gage Park neighborhood. In 1988, of a total of 89 Matchmaker sales, 36 were made in the Gage Park area. In 1987, 21 Matchmaker sales were made in Chicago Lawn. In 1988, 15 Matchmaker sales were made in Chicago Lawn. Thus in 1987, 63.5% of all Matchmaker sales were made in the Gage Park and Chicago Lawn areas.

Of all property sold in 1987 and 1988 by Matchmaker in Chicago Lawn, over 80% was sold east of Kedzie. Kedzie is a street selected by the Magistrate to divide the neighborhoods. Virtually all these sales were to white buyers. For those same years, Matchmaker sold four homes to black buyers in Matchmaker's sales market. Thus Matchmaker's own sales statistics dovetail with the demographic statistics of Dr. Bousifield, an acknowledged expert in Chicago demographic statistics. Matchmaker's business followed market demand in its principal market area. It was not steering whites out of its

market area. Without question it was selling residences to whites in Gage Park and Chicago Lawn in overwhelming percentages.

In all Leadership Council conducted five "tests" of Matchmaker and its salespersons.

Test One

The white testers were Mr. Govas and Ms. Castillo. King was the Matchmaker salesperson who met with them. (For purposes of testing and demographics the Magistrate found and counted Hispanics as whites.) On or about July 22, 1987, Castillo telephoned Matchmaker and spoke with King, informing him that they were interested in buying a house of the southwest side in the $70,000 price range. King set an appointment to interview them for July 25, 1987. Mr. Govas was then employed by the Leadership Council to help locate rental housing for Section VIII clients. The Leadership Council has placed black clients in rental units in the Gage Park and Chicago Lawn area. On or about July 25, 1987, Govas and Castillo met with King at the Matchmaker offices at 5427 South Kedzie Avenue in Chicago. During the interview the testers refused to specify area or style of house. King ran a Multiple Listing Service (hereinafter "MLS") general list of all available residences in the Gage Park, Chicago Lawn, West Lawn, West Elston, and Garfield Ridge. This list contained hundreds of residences and was given to the testers. From this general list testers selected five or six residences for which King provided them specific listings. King suggested and the testers agreed to drive by the five or six listings to view them from the outside.

The MLS listings are computer lists of available real estate. The listing contains all available real estate entered by participating brokers. The MLS lists are general and specific. General listings identify type and location of property with some coded information on features. The specific listings or detailed printouts contain all significant itemized information on each location.

King struck two addresses from the MLS listings that he provided testers Govas and Castillo. These were the properties located at 4400 South LeClaire in Garfield Ridge and the 5210 South Princeton in Fuller Park. The address at 4400 South LeClaire is an empty lot and is listed as unimproved real estate. The Princeton property is an apartment building located on the south side of the city and was not in tester Govas; mind on the southwest side. King struck the addresses because they were not single family residences located in the area specified by the testers. Govas agreed that the testers were not interested in purchasing an empty lot or an apartment building.

During the interview the subject of the great number of lower priced houses east toward Western Avenue and the smaller number of homes at higher prices came up. King told the testers that Gage Park had great supply and lower demand while in West Lawn and Garfield Ridge demand outruns supply. King also said that if the testers saw a house in West Lawn, West Elston, or Garfield Ridge, they should move quickly because those houses generally sold fast. In fact there are more single family residences in Gage Park and Chicago Lawn than in West Lawn, West Elston, and Garfield Ridge, but the homes in Gage Park and Chicago Lawn tend to be older, smaller, on smaller lots, and lower in price. All these statements are true.

Tester Govas could not give all the addresses of the five or six houses for which King provided detailed listings. King tried to set up appointments for two houses, but was unable to set a time convenient to the testers' schedule. The white testers saw no houses.

The black testers Deborah and Maurice Bennett were hired by Leadership Council for Test One. Mrs. Bennett called Matchmaker and spoke to King on July 23, 1987. She informed King that she was seeking to buy a house in the $70,000 range. She at first indicated that she was looking in the southwest side of Chicago. After questioning by King of her familiarity with the "area", tester Bennett stated that she was familiar with the "area" and in fact she had a bank

account at Talman. Talman is located at 55th and Kedzie, one block from the Matchmaker offices. At some point during the telephone conversation, Bennett also indicated she knew and liked the bungalow style house. King then set up an appointment with the Bennetts to interview them on July 25, 1987.

The testers met with King at the Matchmaker offices on July 25, 1987. King confirmed at several points during his subsequent interview with them that the testers knew and wanted to live in the "area". When King provided the testers with a general MLS listing of residences in the Gage Park neighborhood, he asked, "you want to live in this area, right?" The addresses were distributed throughout Gage Park both east and west of Kedzie Avenue.

After reviewing the general computer printout of approximately forty to fifty addresses of all available housing in Gage Park, the testers inquired about the prices of the many residences listed that ran below the testers' suggested price range. King replied that the residences were listed at the lower prices because they fell within the average price for the "area". King also volunteered to run a list of just higher priced houses, but that these would be outside the "area". The testers declined this list. King provided them with the general list so they could drive by some of the addresses.

The testers also indicated that they wanted to buy a bungalow style home, preferably brick with a bay window. Very rarely do bungalow style homes in Gage Park approach the $70,000 price range suggested by the testers. In fact, most fall near $50,000 in price.

At some point during the interview, King showed the testers a picture of a bungalow located in Gage Park east of Kedzie Avenue. King showed the photograph to the testers only to confirm that they knew and liked bungalow style homes as built in Gage Park. Defendant King then lived at 5032 South Washtenaw, which is located approximately two blocks west of Western Avenue in Gage Park. Gage Park is a predominantly white neighborhood. King offered to show the

Bennetts houses in the Gage Park "area" that afternoon, but the testers declined. Both of the Bennetts admitted that they did not believe King encouraged or discouraged them from viewing or choosing to consider any community or house. King treated the Bennetts cordially throughout.

Test Two

The white testers Rita and Joseph Ernst hired for the second test were inexperienced testers. The test that they performed at Matchmaker was their first. Mrs. Ernst informed defendant Walker initially by telephone that she and her husband were looking for a single family residence on the southwest side, south of Roosevelt Road. Also concerning location she informed Walker that they wanted a residence near an expressway that would be convenient for frequent trips to Peoria and for her husband to drive by automobile to the Loop. The Stevenson Expressway (I-55) travels southwest toward Peoria and has an entrance and exits at Kedzie Avenue, and one mile east and west and Damen and Pulaski, respectively. The Ernsts also informed Walker that they were looking for a home in the $65,000 to $75,000 range. Mrs. Ernst spoke with Walker on or about August 12, 1987. The Ernsts informed Walker that they lived in Hazel Crest. Hazel Crest is not convenient for public transportation to the Chicago Loop and is less convenient than Chicago Lawn for automotive transportation to the Chicago Loop as well as to Peoria. In response to their needs for transportation and their first choice of Hazel Crest on moving to Chicago from the state of Georgia, Walker responded "you didn't know the area."

On the next day, August 13, 1987, Walker telephoned the Ernsts to discuss with them detailed information concerning listings in their price range. Walker provided Rita Ernst with specific details on five listings. The five listings were located in Chicago within several blocks of Kedzie Avenue. Four of the five listings are located in Chicago Lawn. Chicago Lawn is predominantly white. Three of the addresses suggested by Walker are south of 71st Street and are west of Western Avenue. Mrs. Ernst wanted to see all five of the residences.

Walker and the Ernsts together viewed four of the five homes. At one home, 3515 West 72nd Street, Rita Ernst inquired of Walker concerning the absence of "For Sale" signs. Walker responded, so people "would not drive around and ask to look at the houses." Mr. Ernst believed that Walker meant that the signs were prohibited so that homeowners would not be bothered by unqualified buyers who "drive around and ask to look at the house." Mrs. Ernst recalled that Walker referred to "nice neighborhoods" when he made his remark concerning the absence of for sale signs due to the prohibition of the Chicago sign ordinance.

Both Rita and Joseph Ernst did not believe in their August, 1987 test that they had been discouraged from viewing available homes in any neighborhood. Both Rita and Joseph Ernst reported that Walker made no express references to race. Both Rita and Joseph Ernst were uncertain if Walker used code words. The "code" words they are unsure of, i.e., "nice" and "certain people". The Magistrate found these to be code words for race.

Subsequently in March, 1988, the Ernsts and Walker viewed two other homes, one of which was located in Gage Park. Gage Park is a predominantly white neighborhood. The residence listed in Gage Park for showing by Walker to the Ernsts were located north of 55th Street.

The black testers in the second test were Linda Hale and James Hill; they also met with King. On August 14, 1987 tester Hale first telephoned Matchmaker and spoke with King. Over the telephone, Hale stated that she was interested in houses in the $70,000 to $75,000 price range. She also firmly directed King to look in the area west of Western Avenue bounded on the north by 55th Street and on the south by 71st Street. Hale never provided a western boundary. King understood that Hale wanted a residence located within one mile or so west of Western Avenue. The area Hale specified fell directly in the Gage Park and Chicago Lawn neighborhoods. Hale's speech contains no accent that would identify her as a member of the black race. King met with Hale

and Hill on August 16, 1987. He presented them with a new "house" listing at 8221 South California, but the testers indicated they did not want to go south of 71st Street. The 8221 South California listing was priced at $62,900 and was located in Ashburne, a white neighborhood.

King then ran a general MLS listing for the Gage Park and Chicago Lawn areas. The list contained all available housing for sale in those neighborhoods and was provided to the testers. From the general list, testers Hale and Hill selected three addresses for viewing. These were:

(1)	5918 South Fairfield	($57,900)
(2)	5830 South Washtenaw	($57,999)
(3)	7217 South Washtenaw	($62,900)

The MLS listings for Chicago Lawn contain necessarily addresses south to 74th Street because it is the southern boundary of that neighborhood for the MLS sector used. The testers stated that they would consider those streets.

Hale had indicated to King that she worked in Hyde Park, but that her husband, tester Hill, flew out of Midway frequently. Both locations are accessible from 55th Street (Garfield Boulevard). Gage Park and Chicago Lawn are about equidistant between the two at the area near Western Avenue.

On July 25, 1987 while the testers were in the Matchmaker office, King set up appointments for the residences located at 5918 South Fairfield and 5830 South Washtenaw. These houses were located approximately one mile from King's own residence. King accompanied the testers to view both houses.

At trial Hale testified that at the time the testers entered the Matchmaker offices, King provided three detailed printouts of houses east of Western Avenue and south of 71st Street. This information, however, is stated neither in her report nor in her complaint. Further, Hale stated in her written report that King had no printouts at the point where the testers first

entered the office. In fact Hale relates that King first said "that he had never met us and he did not know what we would be interested in or he would have already set up some appointments." King himself denies ever providing Hale with detailed listings of houses east of Western Avenue.

Hale and her co-tester Hill both report that King neither encouraged nor discouraged them from considering any house or community.

Test Three

The white testers hired for Test Three were Elvia Fernandez and Manolo Castillo. On October 29, 1987 tester Fernandez telephoned the Matchmaker offices concerning a house advertised in the *Southwest New Herald*. The advertised house was located at 3730 West 61st Street in West Lawn. Fernandez spoke with Walker. Walker described the 3730 West 61st Street house and then provided her with a new listing located at 3359 West 64th Street in Chicago Lawn. The residence listed at 3359 West 64th Street was a very recent Matchmaker "house" listing and had not been advertised nor entered into the MLS. A "house" listing is a listing that the brokerage firm has under exclusive contract with the selling owner.

Fernandez and Castillo informed Walker that they sought a house in the $60,000 to $70,000 range. Walker instructed Fernandez to drive by the two addresses. Fernandez wanted to set appointments for showing on Friday. Walker suggested Saturday and he set an appointment for the testers to come to the office on Saturday, October 31, 1987.

On October 31, 1987 Walker met the testers at the Matchmaker offices. After the testers appeared at the Matchmaker offices, Walker telephoned only the owner of the residence at 3350 West 66th Street in Chicago Lawn to schedule an appointment. An appointment was set and the testers with Walker viewed the residence at 3359 West 64th Street. They viewed no other locations. Walker provided the testers with a general computer printout with 41 listings available single

family residences in Chicago Lawn in their price range. Walker also provided the testers with a profile sheet to explain the codes. Approximately eight homes fell in their price range and three are located east of Kedzie Avenue. Walker instructed the testers to drive by the additional listings if they were dissatisfied with the house at 3359 West 64th Street. Chicago Lawn is a predominantly white neighborhood with some blacks moving in, but not in a pattern of resegregation.

The black testers hired for Test Three were Theresa Prim and Gregory Lawrence. Munoz who interviewed and assisted them was the receptionist and a part-time salesperson with Matchmaker. She passed her State of Illinois Real Estate salesperson licensing examination in the summer of 1987. Shortly after passing, she began working with Matchmaker customers on a part-time basis. When any conflict developed between her duties as receptionist and those of salesperson, Munoz was directed to put her duties as receptionist first.

On October 31, 1987, tester Prim called Matchmaker and spoke with Munoz. Prim inquired concerning two Matchmaker-advertised "house" listings at 5330 South Avers and 3730 West 61st Street. Munoz provided her with detailed information concerning each residence. During the conversation Prim told Munoz that she was interested in purchasing a house at the price of $60,000. Munoz voluntarily provided the details of two additional listings for 3359 West 64th Street in Chicago Lawn and 5649 South Albany in Gage Park. The two listings were Matchmaker "house" listings between $50,000 and $60,000. The listing at 3359 West 64th Street was unadvertised and was not entered on the MLS. It is located west of Kedzie Avenue.

Prim suggested, and Munoz agreed, to contact the owners of the four house listing and try to set up appointments for Sunday, the following day. (P.X. 163a) Munoz attempted to contact the owners and set up appointments for Sunday. Munoz, however, was unsuccessful in each instance. Munoz then telephoned back to Prim to inform her that she had been unable to set up any appointments for Sunday. Munoz spoke

with Prim's husband, informing him as she testified, that she had no appointments to show. Munoz did not identify either Prim's or Lawrence's voice as having a black accent.

On Monday, Prim telephoned Munoz and Munoz again related that she had been unsuccessful at setting up appointments for the four listings. Prim then suggested that appointments be set for the next weekend and Munoz agreed. On Saturday, November 7, 1987, testers Prim and Lawrence, and defendant Munoz viewed two houses. These were the listings at 3359 West 64th Street ($59,900) and at 5649 South Albany ($51,000). Munoz herself resides at 5546 South Whipple in Gage Park, which is located one block east of the Albany house and seven blocks east of the 3359 West 64th Street house.

Munoz had not seen either of the two houses she showed to Prim and Lawrence. A new salesperson, Munoz was not aggressive. Munoz later sold both houses to actual buyers. Munoz invited both Prim and Lawrence back to the Matchmaker office to discuss further potential listings. But Prim and Lawrence refused, telling Munoz that they had another appointment. The black testers were shown the same unadvertised and unlisted house east of Kedzie as the whites were shown. The blacks were shown more houses than the white testers.

The blacks reported to Leadership Council that defendant Munoz did not discourage them from considering any community.

Test Four

Only one white tester, plaintiff Swan, reported on Matchmaker in Test Four. Co-tester Victor Crown minimally participated, arriving two hours late to the appointment with King. On June 1, 1988 tester plaintiff Swan telephoned the Matchmaker office and spoke with King. Swan told King that she wished to purchase a house in the range of $70,000 to $80,000. King believed from further contact with Swan that she was seeking a house close to $80,000. Swan further

told King that she was looking for a location on the southwest side or the suburbs.

On June 4, 1988, Swan met King at the Matchmaker office. King had set up in the interim appointments for showing two houses at 7216 South Avers in West Elston. The West Elston and West Lawn neighborhood contain homes that range in the mid-$70,000 price range. Rarely are homes $70,000 or higher listed for sale in Gage Park and Chicago Lawn.

King also provided Swan with general computer printouts for numerous areas in the City of Chicago and the southwestern suburbs. Swan denies receiving these general printouts, but this is not consistent with her other testimony because she admits that she received the profile sheet and that she was shown how to use it to decipher the MLS codes. The codes explained on the profile sheet only appear on the general computer lists.

King spent two hours discussing southwest side communities with Swan partly to pass the time waiting for Swan's cotester Victor Crown to arrive. Swan does not believe that King seriously suggested any houses, stating that he was very general. King finally canceled the two appointments for showing of the southwest side City houses. Swan was shown no homes. Swan testified that defendant King used "code" words for racial references. King testified that he used no code words for race. His statements concerning "good neighborhoods", "good resale value", and "desirable area" are all true and were said concerning the numerous communities King and Swan discussed while waiting for Crown. King's use of "you know what I mean" was an effort on his part to gain a prospective customer's attention. No other testers found King's use of the phrase "you know what I mean" a code word or phrase even though he uses it regularly.

Swan admits in her report to Leadership Council that King did not discourage her from considering any house or community. She, however, believes he encouraged several communities, although he did not disparage any communities or

houses. King's mention of Catholic Schools was solely meant to be informative.

Swan testified that while she was in the Matchmaker offices, the black tester hired for the fourth test appeared and met with defendant Munoz on the same day. According to Swan Munoz laughed after the black testers left the Matchmaker offices. Swan's testimony was inconsistent for she stated that tester Frazier and Dillard were in the Matchmaker office with defendant Sara Munoz for only five to seven minutes. Dillard reported that he and Frazier were in the office 20 minutes. Munoz testified that Frazier and Dillard were present in the Matchmaker office for 20 to 30 minutes.

Munoz, as receptionist, has the responsibility for passing out MLS lists to prospective customers. On a typical Saturday, she will hand out over a dozen or so to customers stopping by the Matchmaker office. Munoz denies that she laughed at the black testers. She considers herself a member of a minority group, i. e., Hispanic.

The black testers hired for Test Three were plaintiffs Queen Frazier and Melvin Dillard. On June 2, 1988, Frazier telephoned the Matchmaker office and spoke with Munoz. Frazier called for available listings in the $65,000 to $70,000 range on the southwest side of the City of Chicago or suburbs. Munoz asked her to be more specific. Frazier terminated the conversation and on instruction from the Leadership Council telephoned back and specified that she needed to be on a bus line. Munoz took the additional specification to mean that Frazier wanted to remain in the City where bus service is more frequent and accessible.

Munoz later provided Frazier with three Matchmaker "house" listings over the telephone and also gave her the specific features of each address. The addresses were:

(1)	6518 South California	($49,900)
(2)	6152 South Albany	($64,900)
(3)	7317 South Richmond	($69,900)

All the listings are in Chicago Lawn, a predominantly white community. Two listings fall within the price range Frazier provided. Munoz suggested and Frazier agreed to drive by the three addresses.

On June 4, 1988, Frazier and co-tester Dillard were interviewed by Munoz at Matchmaker at a desk near her receptionist's desk. Munoz and the testers discussed the three Matchmaker "house" listings. Frazier and Dillard chose to see the residence located at 6152 South Albany in Chicago Lawn. With Frazier sitting two to three feet away, Munoz called the telephone number of the owner of 6152 South Albany, but received no answer. Munoz then provided the black testers with a complete printout of all available single family residences in Chicago Lawn. Munoz also provided a profile sheet to explain the computer code. Of the 141 listings, 16 fell within the black testers price range, and of these 16, six listings were west of Kedzie Avenue and 10 were east of Kedzie Avenue.

Both Frazier and Dillard reported to Leadership Council that they did not believe that they had been either encouraged or discouraged from considering any community or house. Munoz made no comments disparaging any community or area.

Test Five

The white testers hired for the fifth test were plaintiffs William McCarthy and Sandi Gaffen. On June 13, 1988, testers McCarthy and Gaffen visited the Matchmaker office and spoke with Munoz and Scarpiniti. Testers McCarthy and Gaffen informed Matchmaker staff that they were seeking a home on the southwest side of the City or its suburbs in the $80,000 to $90,000 range.

Plaintiffs McCarthy and Gaffen refused after numerous attempts by Munoz, Scarpiniti, and other Matchmaker staff to be any more specific as to style of house or neighborhood. Munoz and Scarpiniti provided general computer listings of close to 200 homes, some falling within the testers' price

range. These addresses were located throughout the southwest side of the City of Chicago and the southwestern suburbs.

At one point plaintiff McCarthy mentioned he might be interested in a bungalow style house although he did not specify that this was the only style in which he was interested. In fact, he and his co-tester remained very general about house features except for price range.

It is extremely rare to find a bungalow in the Gage Park and Chicago Lawn areas listed above $80,000. None of the defendants ever sold a bungalow in Gage Park or Chicago Lawn for over $70,000. Defendant Scarpiniti showed the testers three houses. These were located in the Ashburne community of the City of Chicago. Two of the houses shown were ranch style and the third was Georgian. The Ashburne community has homes priced substantially higher than Gage Park and Chicago Lawn.

Defendant Scarpiniti informed the testers that to find the house they were looking for, they would need to look west of Kedzie. In fact, the homes chosen by McCarthy to view were located within a few blocks of Kedzie Avenue. Defendant Scarpiniti informed the testers that she would be doing wrong if she steered them, but then she provided them with boundaries for finding homes in their price range on the southwest side. All the information provided by Scarpiniti to the testers was accurate. At no point in her discussion with the white testers did Scarpiniti refer to race nor did she make any derogatory remarks concerning anyone who was black.

The black testers for the fifth test were plaintiffs Glenn Brewer and Karen Haskins-Brewer. On June 8, 1988, Plaintiff Brewer, a full-time employee of Leadership Council, telephoned the Matchmaker office and spoke with Sara Munoz. He informed Munoz that he was interested in purchasing a home on the southwest side, city or suburbs. Munoz in conversations tried to find out more specific geographic limitations. She inquired how far south and then east or west he wanted to look. Brewer responded that he did not

want to go south of 95th Street, but was flexible on east and west boundaries. Brewer also specified that he desired a residence in the $75,000 to $90,000 price range. After further conversations Munoz agreed to send tester Brewer a general computer listing of residences in his price range.

Munoz mailed a general computer list of all available single family residences in Brewer's price range in the area bounded by 87th Street on the north, Western Avenue on the east, 103rd Street on the south, and Cicero Avenue on the west. This geographic area includes the suburbs of Evergreen Park and Oak Lawn. Both suburbs are predominantly white. Munoz also mailed Brewer a profile sheet to explain the MLS codes. Brewer does not speak with any accent that identifies him as a member of any racial minority including black.

Brewer telephoned Munoz back approximately one week later with four addresses from the general computer listing. These addresses were as follows:

(1)	8709 South Washtenaw	($89,900)
(2)	8808 South Washtenaw	($84,900)
(3)	8833 South Utica	($78,900)
(4)	10041 South Kostner	($89,900)

Munoz agreed to try to set up showings of these four houses for the Brewers. Munoz also set an appointment with the Brewers for Monday, June 20, 1988, at 6:00 pm.

The Brewers met with Munoz at 7:00 pm on June 23, 1988. The Brewers arrived one hour late for their June 20, 1988, appointment and Munoz left the office before they arrived. In a subsequent telephone conversation, Brewer explained to Munoz that he had left work late that Monday. Munoz was able to set up one appointment of the four houses Brewer had chosen. This was the residence located at 8709 South Washtenaw in Evergreen Park. Munoz had not been able to set up appointments at the other three houses because two were already under contract for sale and no convenient date could be set for showing the last house. The two houses that

were then under contract were located at 10041 South Kostner and 8808 South Washtenaw in Oak Lawn and Evergreen Park, respectively. The brokers who listed these two houses did not want to show them because they had already executed sale contracts from purchasers. These two houses later closed on those pending contracts. The last house located at 8833 South Utica in Evergreen Park was listed with another broker who found it inconvenient to show it on the night set for the Brewer's appointment.

On June 23, 1988, Munoz met with the Brewers and showed them the house located at 8709 South Washtenaw. Munoz also set up an appointment that night for a second house located at 2701 West 86th Street in Ashburne neighborhood of the City of Chicago. It was priced at $88,000. The second house was located only one block away from the house that the Brewers chose at 8709 South Washtenaw. The Brewers preferred the Ashburne house to the one located in Evergreen Park. Munoz suggested that the Brewers call Matchmaker if they were interested in either of the houses shown. Munoz also asked if the Brewers were interested in seeing other houses. The Brewers declined and never called Matchmaker back.

The Brewers, one of whom was a full-time Leadership Council employee, did not believe that Munoz had encouraged or discouraged them in choosing either houses or communities. Munoz made no misrepresentations to the Brewers concerning the availability of the houses chosen for viewing.

Concerning the conduct of petitioner Mr. Erwin Ernst during these five tests, the trial record shows that he did nothing in violation of Sections 1982 and 3604. In fact, the record demonstrates that Mr. Ernst has worked tirelessly for many years in the Chicago area for open housing.

B. Procedural Background

After a bench trial, the Magistrate found for Leadership Council and its testers and against petitioners and the four

salespersons. She assessed damages of $102,000.00 joint and several liability against Matchmaker and Ernst; also she assessed damages of $6,500 against each salesperson. The greatest part of the damages rendered were punitive. The Leadership Council was due to receive $25,000.00 in punitive damages. A total of $19,000.00 in punitive damages was ordered *in toto* for the testers. Compensatory damages were only granted to Leadership Council in the sum of $33,000.00. Subsequently, she awarded attorneys fees in the amount of $135,718.59. Petitioners appealed both awards.

On appeal the Seventh Circuit Court of Appeals affirmed in part and reversed in part. Concerning petitioners Ernst and Matchmaker, it affirmed their joint and several liability for all compensatory damages except those struck for frustration of purpose. Also concerning the two petitioners, it struck all punitive damages.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents two issues on the liability of a real estate sales corporation and its broker-owner for the alleged discriminatory actions of four salespersons pursuant to Section 1982 and Section 3604. Although the broker-dealer has been found blameless, the Seventh Circuit has applied the doctrine of *respondeat superior* to find the corporation strictly liable and has then disregarded the corporate protection afforded by Illinois state law to hold the broker-dealer jointly liable for compensatory damages. The Seventh Circuit has done so in spite of the fact that the plaintiff testers at trial presented no proof of injury under Section 1982, and no proof of actual misrepresentations under Section 3604. This Court has addressed these momentous and substantial issues in previous opinions which the Seventh Circuit has ignored or misapplied.

A. BY RELIEVING TESTERS OF THE NECESSITY OF PROVING AT TRIAL INJURY IN FACT AND STANDING, THE SEVENTH CIRCUIT HAS ABROGATED THIS COURT'S REASONING IN THE *WARTH*, *VILLAGE OF BELLWOOD*, AND THE *HAVEN'S* OPINIONS.

The gist of petitioners argument is that the testers proved no injury at trial and their claims should, therefore, have been dismissed. The testers offered no proof of injury in fact and thus lacked standing. The Seventh Circuit and the Magistrate realized this hole in the evidence, but found standing nonetheless for the testers on their Section 1982 and Section 3604 claim. The Seventh Circuit addressed the standing issue raised by petitioners as one of standing to sue and not one of proof at trial. The confusion is serious and implicates Article III.

This case was foreshadowed by this Court's decisions in two earlier cases. These have been ignored or misunderstood

by the Seventh Circuit. In *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 115 fn. 31 (1978), this Court warned litigants under the Fair Housing Act that "although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial." This warning was repeated later in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379 fn. 21 (1981).

The petitioners challenge the Seventh Circuit's decision relieving testers of the need to prove injury in fact at trial. Thus, under current Seventh Circuit law, plaintiffs suing under Section 1982 need not prove standing. The testers did not testify to any injury and showed no need to any judicial remedy. As a consequence, the Magistrate made the crucial finding that the "individual testers did not testify to any specific injury resulting from the conduct of any defendant." (Mag. Op. 11/7/90, p. 25) To later rule that Section 1982 had been violated is in direct conflict with this Court's decision in *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

The standing of the plaintiffs under the Fair Housing Act hinges on the salespersons making the sort of misrepresentations forbidden by Section 3604 (d). The Magistrate found that "each defendant made unavailable to the plaintiffs one or more dwellings based on plaintiffs' race...and misrepresented by omissions of information that houses were not available in certain areas and price ranges that were in fact available." (Op. 11/7/90, p. 30)

The Magistrate clearly erred in finding omissions of fact. The record of the trial contains no instance where defendants omitted disclosing available information. In most instances the testers received or viewed general MLS listings for Gage Park and Chicago Lawn. The Magistrate either ignored or failed to grasp the significance of these general listings. To require more of real estate salespersons than the listing of available housing in general MLS lists not only would place an impossible burden upon them, but would require indepen-

dent verification on a daily basis by each real estate office of the completeness of the MLS.

Suffice to say the Magistrate could not point to a specific omission any defendant made, either intentionally or unintentionally. Without specific instances and specific findings of misrepresentations, the testers have no standing to maintain their Section 3604 claim. Without findings of specific omissions tied to identifiable defendants, the testers claims should have been dismissed. The Seventh Circuit in its opinion failed to address petitioners' Section 1982 concerns and gave the briefest of attention to their Section 3604 issues.

The real issue of the misrepresentations by omission made by the salespersons is whether these were authorized by petitioners Ernst and Matchmaker. They were not and no Court found that they had been. The principles guiding attribution misrepresentations to the principal by the doctrine of *respondeat superior* is clarified *infra*.

B. CONTRARY TO THE DECISION OF THIS COURT IN *GENERAL BUILDING CONTRACTORS ASSOCIATION*, THE SEVENTH CIRCUIT HAS APPLIED THE DOCTRINE OF *RESPONDEAT SUPERIOR* AS ONE OF STRICT LIABILITY TO REAL ESTATE BROKERS FOR THE CONDUCT OF THEIR INDEPENDENT SALES AGENTS.

The decision of the Seventh Circuit to treat under the aegis of *respondeat superior* the relationship between the real estate broker and his salesperson as one of strict liability will cause a national upheaval in the real estate industry. Traditionally the relationship between real estate brokers and their salespersons has been that of independent contractors. The National Association of Realtors has drafted and suggests the use of an independent contractor agreement for salespersons. Matchmaker uses these form contracts with its salespersons. The impact of the Seventh Circuit's decision is to signal total disregard of federal common law principles for resolving the culpability of brokers in housing discrimination

cases. Instead, by the Seventh Circuit's reasoning the broker and his corporate business, no matter what, is strictly liable for any discriminatory misconduct of its salespersons.

The Seventh Circuit is not alone in finding brokers strictly liable for the discriminatory conduct of its salespersons. The Seventh Circuit relied heavily on the reasoning in *Walker* v. *Crigler*, 976 F.2d 900 (4th Cir. 1992) and to a lesser extent cases from the Ninth Circuit (*Phiffer* v. *Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980)) and the Sixth Circuit (*Green* v. *Century 21*, 740 F.2d 460 (6th Cir. 1984)).

In *General Building Contractors Association, Inc.* v. *Pennsylvania, et al.*, 458 U.S. 375 (1982), a Section 1981 civil rights case, this Court reversed a judgment against a trade association held liable for employment discrimination on the theory of *respondeat superior*. Among the theories dismissed by this Court is that the trade association had a "nondelegable duty" to see that discrimination did not occur. This same theory is the common thread in the reasoning of the Seventh Circuit, *Walker* and the other cases on which the Seventh Circuit relies. As this Court held in *General Building*, discriminatory intent cannot be imputed by operation of *respondeat superior*. The doctrine of *respondeat superior* could not be used with Section 1981 to make the trade associations the guarantor of plaintiff minority employees' rights against the engineers union. Similarly, with no finding that neither Erwin Ernst nor Matchmaker intentionally discriminated against Leadership Council and its testers, petitioners cannot now be held liable by operation of *respondeat superior* on the theory that petitioners' duties under Section 1982 and Section 3604 were nondelegable.

Petitioners do not seek to shift or to delegate their responsibilities under Section 1982 and Section 3604. Rather they recognize that both they and the four salespersons involved are subject to Sections 1982 and 3604. The issue comes in whether they have each exercised their respective duties or engaged in misconduct.

There is no question that petitioners Ernst and Matchmaker had a specific policy against housing discrimination. There is no question that the salespersons knew of the policy and knew which conduct it prohibited. The Magistrate, in fact, found and the record is uncontested that one of the salespersons Carol Scarpiniti had the white testers close the door to her office in Test Five so that sales manager of Matchmaker, Robert Ernst, would not hear her when she "steered" the testers into more affluent neighborhoods. (App. p. 10a) There is no way petitioners could guard against Scarpiniti's actions that she even admitted were against Matchmaker office policy. To hold petitioners strictly liable now under the theory of *respondeat superior* goes well beyond the remedial purposes of Section 1982 and Section 3604, and in fact turns petitioners into the guarantors this Court warned as excessive.

The Seventh Circuit analysis of the relationship between the real estate broker as a principal and the sales agent is confused. Without reference to the independent salesperson contract, the Magistrate and the Seventh Circuit triumphantly concluded that there was an agency relationship. The petitioners, however, do not contest that Matchmaker has an agency relationship with its salespersons. Erwin Ernst has contested any agency relationship with the salespersons. The independent contractor's agreement between Matchmaker and its salespersons outlines the boundaries of this agency arrangement. The confusion of the Seventh Circuits' analysis then is further extended to the assumption of principles governing the master-servant type of agency. See Appendix, p. 18a fn 12 . It makes this leap without any findings as to what type of agency is involved.

The relationship between Matchmaker and its salesperson is an independent contractor agency. It is not that of master-servant. The similarities are reminiscent of some factors discussed by this Court in the *General Building* opinion:

> At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control." Restatement §1. Equally central to the mas-

> ter-servant relation is the master's control over or right to control the physical activities of the servant. The District Court found that the requirement of control was satisfied because "the employers retained power to oppose the union discrimination." However, the "power to oppose" the Union, even when the opposition is grounded in the terms of the collective-bargaining agreement, is not tantamount to a "right to control" the Union. Indeed, a rule equating the two would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines on which the District Court relied.
> *Id.*, at 393-394.

Neither Matchmaker nor Ernst is the sole shareholder of the Real Estate Sales Center and its chief executive officer, have full control over the sales activities of Matchmaker's salespersons. By contract, Matchmaker as managed by Ernst has no right or authority:

(a) to assign an independent contractor any prospective listings or to direct the method of handling any such lead,

(b) to require any salesperson to accept or service any particular listing or prospective listing offered,

(c) to direct any salesperson to see or service particular parties,

(d) to restrict salesperson's activities to particular areas,

(e) to direct or control salesperson's actions except as specifically required by law and the salesperson assumes and retains discretion for methods, techniques, and procedures in soliciting property. Thus Matchmaker has little control over its salespersons.

The Seventh Circuit extends the confusion by assuming without naming the agency between Matchmaker and its salespersons as master-servant. It then resorts to the master-

servant rules set forth in the Restatements on Agency. The rules to which it refers apply solely to master-servant agency and are only generally stated without reference to the exceptions. The Seventh Circuit could have avoided the confusion by analyzing Matchmakers relationship as an independent contractor and then referring to the restatement rules for the specific tort involved. If it had done so, however, *respondeat superior* would not have governed.

The only wrong to the testers mentioned by the Seventh Circuit was the tort of misrepresentation. There was no concrete injury under Section 1982. Misrepresentation can provide standing under Section 3604 alone on this record. The misrepresentation here, however, is one of omission. The Magistrate found that everything the salespersons actually said was true. What she faulted them on was their failure to say more.

The Restatements on Agency provides a clear rule on the instance where principals can be held liable for the misrepresentations of their agents. It is stated as follows:

> Misrepresentations; in General
> A principal is subject to liability for loss caused to another by the others reliance upon a tortious representation of a servant or other agent, if the representation is:
>
> (a) authorized;
> (b) apparently authorized; or
> (c) within the power of the agent to make for the principal.
>
> *Restatement* §257.

The record will not support *respondeat superior* on any of the three grounds listed above. Again, the Carol Scarpiniti incident is helpful. To engage in any discriminatory steering, she knew that she had to keep it secret from Matchmaker supervisors. Her actions and words even warned the testers that she had stepped outside the Open Housing policies in force at Matchmaker. Thus, as is clear from her agreement,

her conduct was not authorized, did not appear authorized, and was not within her power.

The most revealing discussion in the Seventh Circuit opinion is found in the endorsement of the weighing of interests between innocent parties as outlined in *Walker*, *supra*, p. 903. It is at least straightforward.

It is hard to believe that innocent people such as petitioners Matchmaker and Ernst should be held liable for racial discrimination simply because their interests do not weigh heavy enough. Guilt under Section 1982 is not a matter of weighing interests. As this Court clearly ruled in *General Building*, only those who intentionally engage in racial discrimination are liable.

The Seventh Circuit raises the stakes beyond applying *respondeat superior* strictly. It also ruled that Matchmakers corporate veil could be disregarded finding petitioner Ernst liable simply because he owns the stock of Matchmaker corporation. Thus, Ernst, acknowledged to be an innocent shareholder, becomes liable for the actions of salespersons with whom he has no contract nor agency relationship. The Seventh Circuit did not even inquire into whether Matchmaker had observed all corporate formalities. The simple fact Ernst owned the stock of Matchmaker was enough to hold him jointly and severally liable for the misconduct of the salespersons.

There is no question that petitioner Ernst is innocent of racially discriminatory conduct. He had for years actively worked in favor of open housing in Chicago and his Gage Park neighborhood. Ernst and Matchmaker have promoted the Voluntary Affirmative Marketing Agreement sponsored by the U.S. Department of Housing and Urban Development, by the National Association of Realtors, and by the Chicago Real Estate Board. Among the efforts made by Ernst and Matchmaker on behalf of the Voluntary Affirmative Marketing Agreement is to work with other Chicago area brokers to obtain their commitment to the terms and spirit of the agreement. Also Ernst and Matchmaker have made great

efforts to organize and to initiate a joint listing service for white and black brokers in the City of Chicago. The listing service is called the Metro Listing Service. Ernst worked to organize the Metro Listing Service under the sponsorship of the Chicago Board. In 1986, Ernst was chairman of the Board Committee that initiated the Metro Listing Service; in 1987 and 1988, he was a member of the Metro Listing Service itself. The Metro Listing Service made listings in predominantly white areas known and available to black brokers and their customers. As a member of the Metro Listing Service, Ernst and Matchmaker made all their "house" listings part of the general listing of available real estate for all members of the Metro service. The majority of members of the Metro Listing Service are minorities. Mr. Maner and Mr. Williams, who testified vigorously on Mr. Ernst' behalf detailing his work for open housing in Chicago, are the first two black presidents of the Chicago Board of Realtors and had worked with Mr. Ernst for open housing.

Finally, the basic fallacy in the Seventh Circuit's analysis is that its rationale, erroneous as it is, has no place even in this case. In *Walker*, the weighing of interests between the innocent victim and the innocent landlord involved real injuries. The Fourth Circuit provided a deep pocket to compensate real losses. In the instant case, as the Magistrate found and the Seventh Circuit recognized, there were no injuries. Without injuries the interests of the testers cannot outweigh the interest of the innocent petitioners. There is no need for a deep pocket to compensate the testers and their organization.

CONCLUSION

Wherefore this Court should grant Ernst and Matchmaker's Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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